

82-1378

U.S. District Court, N.J.

FILED

OCT 13 1963

ALEXANDER L. STEVENS,  
CLERK

In This Cause

**Supreme Court of the United States**

**October Term, 1962**

**ERNEST G. MILLER**

*Claimant-Petitioner,*

*against*

**PITTSFORD STEVEDORING CORPORATION, and  
NEW JERSEY MANUFACTURERS INSURANCE  
COMPANY,**

*Employer-Carrier-Respondents,*

*and*

**DIRECTOR OFFICE OF WORKERS' COMPENSA-  
TION PROGRAMS**

*Federal Respondent,*

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

**Brief in Response to Petition for Certiorari**

**LEONARD J. LEVINE**

**LEVINE & GALLAGHER**

*Attorneys for Respondents' Petition*

*Stevedoring Corp. and New*

*Jersey Manufacturers Ins. Co.*

*10 Nassau Street*

*New York, NY 10038*

*(212) 512-1111*

i.

**Questions Presented.**

1. Was the United States Court of Appeals for the Third Circuit correct in affirming the decision of the Benefits Review Board that the claimant did not meet the situs requirement of 33 USCA 903 (a) of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U. S. C. §901 *et seq.*?

2. Was the administrative law judge correct in holding that the claimant did not meet the status requirement of 33 U. S. C. 902 (3) of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U. S. C. 901 *et seq.*?

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v.

**Parties.**

The parties in the trial Court below were the petitioner, Ernest G. Miller, the Employer respondent, Pittston Stevedoring Corporation and the Carrier respondent, New Jersey Manufacturers Insurance Company, and the Federal respondent, Director, Office of Workers' Compensation Programs.

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1982.

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ERNEST G. MILLER,

*Claimant/Petitioner,*

*against*

PITTSTON STEVEDORING CORPORATION, and NEW  
JERSEY MANUFACTURERS INSURANCE COMPANY,

*Employer/Carrier Respondents,*

*and*

DIRECTOR OFFICE OF WORKERS' COMPENSATION  
PROGRAMS,

*Federal Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT.

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**Brief in Response to Petition for Certiorari.**

**Opinions Below.**

The decision of the Administrative Law Judge is unreported and is appended hereto as Appendix C.

The decision of the Benefits Review Board is unreported and is appended hereto as Appendix B.

The decision of the Court of Appeals is unreported and is appended hereto as Appendix A.

**Constitutional and Statutory Provision Involved.**

United States Constitution, Article III, Section 2.

**Designation of Corporate Relationships.**

Respondents Pittston Stevedoring Corporation and New Jersey Manufacturers Insurance Company, filing this brief in response to Petition for Certiorari, as respondents in this proceeding state that:

This is their original Designation of Corporate Relationships.

Said respondents are not owned by any parent corporations.

Said respondents do not have any ownership interest in any subsidiary (excepting only wholly owned subsidiaries).

Said respondents do not have any affiliates.

Dated: March 10, 1983



### **Statement of the Case.**

By decision and order dated June 25, 1980, Administrative Law Judge Reno E. Bonfanti found that, based upon the substantial evidence herein, the claimant has not satisfied either the "status" requirements of §2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.*, nor was the injury the claimant sustained on a covered "situs" as required by §3(a) of this Act.

By decision and order dated February 22, 1982, on appeal by claimant, the Benefits Review Board concluded that the administrative law judge's determination that claimant was not injured on a situs covered by §3(a) is supported by substantial evidence in the record considered as a whole, is rational and is in accordance with law and held therefore that the claimant was properly denied benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Benefits Review Board in its decision held that in view of the Board's determination with regard to the application of §3(a), that it was unnecessary for the Board to evaluate the §2(3) issue as to whether the claimant had the required status under the Act (decision and order of the Benefits Review Board, p. 2).

The United States Court of Appeals for the Third Circuit affirmed the decision of the Benefits Review Board.

As is set forth at page one of the decision and order of the administrative law judge the parties stipulated and the judge accepted the following:

- “(1) the employer-employee relationship existed,
- (2) claimant's injury arose out of and during the

course of his employment, (3) claimant was injured on June 23, 1978 and remains temporarily totally disabled, (4) claimant was injured in an accident on the New Jersey Turnpike when he was driving a tractor trailer truck enroute from Port Newark, New Jersey to Wilmington, Delaware. (5) The truck contained rigging or ship's gear to be used in loading or unloading of a car ship in Wilmington. (6) Claimant's average weekly wage at the time of the accident was \$355, for a compensation rate of \$236.67. (7) Claimant filed timely notice of the injury (8) claimant is receiving compensation for this injury under the New Jersey Compensation Act (9) Employer filed a notice of controversion on April 18, 1979" (A.L.J. decision, p. 1).

At page two of his decision and order, the administrative law judge in his findings of fact states that on the afternoon of June 23, 1978, the date of the accident herein, the claimant's supervisor Mr. Ronald J. Petrocelli told the claimant to go to the garage and pick up a truck loaded with ship's gear and to drive the truck to a pier in Wilmington, Delaware, from Port Newark Terminal. The claimant had testified at the hearing of February 6, 1980, that he had been working that morning and for several years previously for the employer at Berth 9, of the Port Newark Terminal (transcript, p. 20 of hearing of February 6, 1980).

The claimant alleged that in the course of his employment he went aboard ship, in addition to loading and unloading ship cargo in the warehouse by driving a fork lift, and the claimant further alleged that on the morning of June 23, 1978, he was operating a fork lift on the truck line in the warehouse. He testified that after lunch his

supervisor Petrocelli told him to go to the garage, pick up the truck and drive it to Wilmington, Delaware (decision and order of administrative law judge, dated June 25, 1980, p. 2).

However, on cross examination commencing at page 36 of the minutes of February 6, 1980, the claimant was confronted with a calendar that he had maintained for the months of May, 1978 and June of 1978, which were introduced into the record as Exhibits E1 and E2 (decision and order of administrative law judge, p. 2). The claimant testified that the reason he kept his calendar was to keep track of his hours and job assignments because there was a different pay scale for his work as a truck driver as opposed to other work (decision and order of administrative law judge, dated June 25, 1980, p. 2; transcript of hearing, February 6, 1980, p. 36). When the claimant performed work as a truck driver he would note this work on the calendar as "Truck" (transcript of hearing, February 6, 1980, pp. 38-44). The claimant was forced to concede that, except for five days in May and June of 1978, all the work he performed was as a truck driver (decision and order of administrative law judge, dated June 25, 1980, p. 2; transcript of hearing, February 6, 1980, pp. 38-44). Claimant was unable to state what he actually had done on any of the five days he did not drive the truck (tr., pp. 41, 47).

Furthermore at the hearing of March 21, 1980, claimant's supervisor Ronald J. Petrocelli testified that approximately three months prior to the accident on June 23, 1978, the claimant had been assigned to a regular job as a truck driver to transport gear and gear parts to various places and that the claimant reported directly to him every morning for his work assignments. Mr. Petrocelli testified that on the morning of June 23, 1978, at about eight

o'clock the claimant reported directly to him and Mr. Petrocelli told the claimant that they had some gear to transport to Wilmington, Delaware, and they went together to assemble the gear and the claimant loaded it on to a bed truck. Mr. Petrocelli testified the entire loading process took until approximately 11:30 A. M. at which time the claimant went out to lunch (transcript of hearing, March 21, 1980, p. 104). Mr. Petrocelli testified that the claimant did not handle any cargo on June 23, 1978, nor did the claimant handle any cargo on the job as a truck driver (transcript of hearing, March 21, 1980, p. 105).

Mr. Petrocelli explained that about three months before the accident he was looking for a truck driver to work for the employer to transport gear and gear parts because before that time the employer had used outside truck carriers but it was found that the employer could not obtain truck drivers on a last minute notice. Mr. Petrocelli testified that he therefore assigned the claimant to perform this work as a truck driver and that he never handled any cargo in his job working under Mr. Petrocelli's supervision (transcript of hearing, March 21, 1980, pp. 107, 108).

The administrative law judge held that, after careful evaluation of the demeanor and credibility of the witnesses, the judge credited the testimony of Mr. Petrocelli as to the claimant's work generally and as to the claimant's work on the date of the accident. The judge specifically found that he did not believe the claimant's testimony wherein the claimant alleged that he was working in the warehouse on the truck line on the morning of the date of the accident. The judge found as a fact that on the date of the accident the claimant's job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about

three or four hours away. He found that on the date of the accident the claimant did not handle any cargo. The judge further found that the accident that the claimant had on June 23, 1978, occurred on the New Jersey Turnpike approximately 30 minutes away from Port Newark (decision and order of the administrative law judge, dated June 25, 1980, pp. 2, 3).

After an analysis of the pertinent law on the subject, the administrative law judge concluded that the claimant has not satisfied either the "status" requirements of §2(3) of the Act and also that the claimant was not injured on a covered "situs" under §3(a) of the Act, and for these reasons the judge denied the claim (decision and order of administrative law judge, dated June 25, 1980, p. 4).

On the appeal to the Benefits Review Board, the Board by decision and order dated February 22, 1982, concluded that the administrative law judge's determination that claimant was not injured on a covered situs pursuant to §3(a) is supported by substantial evidence in the record considered as a whole, is rational and in accordance with the law, and affirmed the judge's denial of the claim. The Benefits Review Board stated that in the light of the determination with regard to §3(a) as to situs it was unnecessary for the Board to evaluate the §2(3) issue as to status (decision and order of the Benefits Review Board, dated February 22, 1982, p. 2). This decision was affirmed by the Court of Appeals.

## POINT I.

**The decisions of the administrative law judge, the Benefits Review Board and the Court of Appeals that the claimant was not injured on a covered situs pursuant to §3(a) of the Longshoremen's and Harbor Workers' Compensation Act is supported by substantial evidence and is correct as a matter of law. This decision does not present a substantial federal question not heretofore determined by this court, and therefore the petition for certiorari should be denied.**

The administrative law judge in his decision has concluded as a finding of fact that, on the day of his accident, the *sole* job of the claimant herein consisted of loading ship's gear onto a truck and driving it from Port Newark to a pier in Wilmington, Delaware.

The claimant conceded that the accident occurred after he had driven approximately one half hour down the New Jersey Turnpike towards Wilmington, Delaware, from Newark, New Jersey, which would render the site of the accident many miles from Port Newark, New Jersey.

In its seminal decision interpreting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, the Supreme Court at 432 U. S. 252 specifically stated that in order for a claim to come within the Act, that pursuant to §903 the injury must occur within a covered situs, and quoted §903 in pertinent part:

“Compensation shall be payable \* \* \* in respect of disability or death of an employee but only if the disability or death results from an injury occurring

upon the navigable waters of the United States (including any adjoining piers, wharf, drydock, terminal, building way, railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel \* \* \*."

In the Court's analysis at 432 U. S. 279, the Court considered the above quoted §903 and noted that Congress intended to expand the coverage situs to include the areas as specified in §903 and not just accidents occurring on the water.

In a subsequent decision, *P. C. Pfeiffer Company, Inc. v. Ford*, 100 S. Ct. 328 (1979), the Supreme Court continued to hold that "to be eligible for compensation a person must be an employee as defined by §2(3) who sustains injury on the situs defined by §3(a)," 100 S. Ct. 332. At 100 S. Ct. 334 the Court stated "the Act as determined above contains *distinct* situs and status requirements. The situs test of §3(a) allows recovery for an injury suffered on navigable waters or certain *adjoining* areas." (Emphasis added.)

In *Sealand Serv. v. Director, Office of Workers' Compensation*, 540 F. 2d 629 (C. A. 3, 1976), which was decided before the *Caputo* case, *supra*, the Court had suggested that there was no real situs requirement under §3(a) as long as the status requirement was satisfied that the claimant be an employee "engaged in maritime employment." However, subsequent to the *Caputo* decision, the Court did recognize in *Dravo Corporation v. Banks*, 567 F. 2d 593 (C. A. 3, 1977) at page 595, that in order for a claimant to be covered by the Act he must also have sustained his injury on a covered situs as set forth in §3(a) of the Act.

In view of the distinct situs and status requirements as clearly set forth in the Act, as well as this Court's recognition of these distinct status and situs requirements, petitioners attempt to argue that the situs requirement is automatically met if the status requirement is met, is completely devoid of legal support.

Furthermore, in his petition, petitioner asserts that even if the situs requirement is not precisely the same as the status requirement, that nevertheless the location of the petitioner's accident was somehow on an "adjoining area customarily used by the employer in the loading, unloading, repairing, or building a vessel."

It is clear that the situs requirement is set forth in §3(a) requires that the injury occur upon the navigable waters of the United States or certain adjoining areas. It is also uncontroverted that the claimant sustained an accident after driving approximately 30 minutes down the New Jersey Turnpike in his truck. The Administrative law judge found and his finding of fact is conclusive, that the claimant had been employed on the day of the accident as a truck driver, not handling any cargo whatsoever, and the administrative law judge found that the claimant had been so employed solely as a truck driver for three months prior to the accident.

As part of the alleged factual basis for this argument that the New Jersey Turnpike is a covered situs, Petitioner alleges that it was uncontroverted that it was customary for the employer to use the petitioner to transport cargo to various piers at which time he performed stevedoring operations of loading and unloading; this assertion is incorrect and completely unsupported by the record. We wish this Court to note that this allegation was specifically



rejected as a finding of fact by the administrative law judge. Therefore the alleged factual basis for this incredible argument that New Jersey Turnpike is a covered situs, is simply not found in the record, and for this reason as well this argument must be rejected.

Petitioner's attempt to transform an inland portion of the New Jersey Turnpike where the Petitioner had his accident, into an area adjoining navigable waters where the employer customarily loads and unloads vessels, is utterly without foundation in the record, and is legally incorrect. If this argument were accepted it would mean that the entire continental United States would become a covered situs, since cargo taken off a ship presumably will be driven inland throughout the United States.

It is submitted that there is no basis in law or in fact to contend that the situs requirement of §3(a) has been satisfied by the Petitioner herein, and on this basis alone this petition should be denied.

## **POINT II.**

**The Petitioner was not an employee and did not meet the status requirement of §2(3) of the Act and this is an additional basis for denying this petition for certiorari.**

The administrative law judge has found as fact that on the day of his accident the claimant was employed solely as a truck driver, and that the claimant in the morning loaded ship's gear onto a trailer and in the afternoon drove it from Port Newark to a pier in Wilmington, Delaware, and that on the date of his accident the claimant did not handle any cargo. The administrative law judge further found that only for a few days in May and June of 1978 did the claimant handle any cargo in any manner and that on all other days he was a truck driver.

Claimant's attorney's allegation that the employer does not deny that it used the claimant to transport cargo to various piers at which time he performed stevedoring operations of loading and unloading, is incorrect and completely unsupported by the record. We also wish this Court to note that this allegation was specifically rejected as a finding of fact by the administrative law judge.

Based upon the above findings of fact, it is clear that under the decision of the Supreme Court, the claimant was not a covered employee within §2(3).

The claimant has alleged that he is a longshoreman engaged in the process of loading and unloading cargo. However, the judge has specifically found that the claimant was not connected with unloading, or transportation of cargo and this finding of fact cannot now be controverted since it is based upon substantial evidence in the record.

The determination of the claimant's status under §2(3), should begin with the Supreme Court's discussion in *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, *supra*, which concerned the claims of two workers, Caputo and Blundo. In its discussion, the Court noted at 432 U. S. 264 that, after the 1972 amendments, the Act covered only "employees"—that is workers who were "engaged in maritime employment," which the Act defined to include "any longshoreman or other person engaged in longshoring operations \* \* \*." The Court noted, however, that the Congress had failed to define any of the key statutory terms such as "maritime employment," "longshoremen," or "longshoring operations." The Court therefore placed great reliance on the "typical example" of shoreward coverage provided in Committee Reports, which reads in relevant part:

“To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo.”

It should be emphasized that in its review of this “typical example,” the Court stated at 432 U. S. 268 that “the example makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered [by the Act].”

In its analysis of this “typical example,” the Court set forth the applicable test for covered workers—that they must be “*engaged in the handling of cargo as it moves between sea and land transportation* after its immediate unloading.” 432 U. S. 267. (Emphasis added.)

In *P. C. Pfeiffer Co. v. Ford*, 62 L. Ed. 2d 234, the Court affirmed this test and made it the definitive test for determination of coverage, holding that Congress intended “a definition of Maritime Employment that reaches any

worker who moves cargo between ship and land transportation \* \* \*." 62 L. Ed. 2d 237.

In *Pfeiffer* the Court further held at 62 L. Ed. 2d 236 that §2(3)'s terms "longshoreman" and "other person engaged in longshoring operations" refers to Workers doing tasks "*traditionally performed by longshoremen.*" (Emphasis added.)

Under the above described rules of law, it is clear that, based upon the established facts as shown in the record, claimant is not a covered employee under the Act because the claimant herein on the date of the accident and on all times prior to the accident was not engaged in handling of any cargo whether part of sea *or* land transportation and also because the job the claimant performed and to which he had been assigned for three months prior to his accident was not and is not work traditionally performed by longshoremen.

### CONCLUSION.

**For the foregoing reasons the claimant herein is not an employee covered by the Act because he did not meet either the situs requirement of §3(a) or the status requirement of §2(3) of the Act, and the petition for a writ of certiorari should therefor be denied.**

Respectfully submitted,

LEONARD J. LINDEN  
LINDEN & GALLAGHER  
Attorneys for Employer  
and Carrier, Respondents

1a

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 32-3146

- - - - - X

ERNEST G. MILLER,

*Claimant/Petitioner,*

*vs.*

PITTSTON STEVEDORING CORP., and NEW  
JERSEY MANUFACTURERS INSURANCE  
COMPANY,

*Employer/Carrier  
Respondents,*

*and*

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,

*Federal Respondent.*

- - - - - X

Petition for Review  
Benefits Review Board  
(OWCP No. 2-54832)

Submitted Under Third Circuit Rule 12(6)  
November 16, 1982  
Before: ALDISERT, SLOVITER, and ROSENN,  
Circuit Judges.

JUDGMENT ORDER.

After considering the contentions of the petitioner and the employer-carrier respondents, and applying the teachings of *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), it is

ADJUDGED and ORDERED that the petition to set aside the order of the Benefits Review Board be and the same is hereby denied.

Costs taxed against petitioner.

BY THE COURT,

s/ ALDISERT  
\_\_\_\_\_  
Circuit Judge

3a

Attest:

s/ M. ELIZABETH FERGUSON  
Chief Deputy Clerk

DATED: November 16, 1982

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APPENDIX B.

OPINION OF THE BENEFITS REVIEW BOARD.

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 80-1052

- - - - - X

ERNEST G. MILLER,

*Claimant-Petitioner,*

*v.*

PITTSTON STEVEDORING CORPORATION and  
NEW JERSEY MANUFACTURER'S INSUR-  
ANCE COMPANY,

*Employer/Carrier-  
Respondents.*

- - - - - X

Appeal from the Decision and Order  
of Reno E. Bonfanti, Administrative Law  
Judge, United States Department of Labor.

Paul A. Gritz, Jersey City, New  
Jersey, for the claimant.



Leonard J. Linden (Linden & Gallagher), Jersey City, New Jersey, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order (79-LHCA-2027) of Administrative Law Judge Reno E. Bonfanti pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).

The administrative law judge found that claimant was not engaged in employment within Section 2(3), 33 U.S.C. §902 (3), and was not injured on a situs covered by Section 3(a), 33 U.S.C. §903(a). Therefore, he denied claimant benefits under the Act. Claimant appeals, arguing

that he was entitled to coverage under the Act. In addition, claimant argues that the administrative law judge erred in re-opening the record to permit employer to bring in an additional witness.

Preliminarily, we hold that the administrative law judge's decision to re-open the record was not an abuse of his discretion. 20 C.F.R. §702.338; 20 C.F.R. §702.347.

Moreover, having carefully reviewed the record and considered claimant's arguments in this case, we conclude that the administrative law judge's determination that claimant was not injured on a situs covered by Section 3(a) is supported by substantial evidence in the record considered as a whole, is rational and is in accordance with law. 33 U.S.C. §921 (b) (3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965). Therefore, the administrative law judge properly denied claimant benefits.

In light of this determination with regard to Section 3(a), it is unnecessary for us to reach the Section 2(3) issue.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

s/\_\_\_\_\_  
ROBERT L. RAMSEY, Chief  
Administrative Appeals  
Judge

s/\_\_\_\_\_  
JULIUS MILLER  
Administrative Appeals  
Judge

s/\_\_\_\_\_  
ISMENE M. KALARIS  
Administrative Appeals  
Judge

Dated this 22nd  
day of February 1982

5b

FILED AS PART  
OF THE RECORD  
FEB 22 1982

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(date)

*Agnes Kurtz* / *h*

---

(Clerk)

Benefits Review Board

1c

APPENDIX C.

OPINION OF THE ADMINISTRATIVE LAW JUDGE.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
Suite 700-1111 20th Street, N.W.  
WASHINGTON, D.C. 20036

- - - - - X

IN THE MATTER

of

ERNEST G. MILLER,

*Claimant,*

*vs.*

PITTSTON STEVEDORING CORPORATION,

*Employer,*

NEW JERSEY MANUFACTURES INS. CO.,

*Carrier.*

- - - - - X

Case No. 79-LHCA-2027

OWCP No. 2-54823

Paul Gritz, Esq., for the Claimant.

Leonard J. Linden, Esq., for the  
Employer/Carrier.

Before: Reno E. Bonfanti  
Administrative Law Judge

DECISION AND ORDER.

This is a claim for workmen's compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

The parties stipulated and I accept the following: (1) the employer-employee relationship existed, (2) claimant's injury arose out of and during the course of his employment, (3) claimant was injured on June 23, 1978 and remains temporarily totally disabled, (4) claimant was injured in an accident on the New Jersey Turnpike when he was driving a tractor trailer truck enroute from Port Newark,

New Jersey to Wilmington, Delaware, (5) the truck contained rigging or ship's gear to be used in loading or unloading of a car ship in Wilmington, (6) claimant's average weekly wage at the time of the accident was \$355, for a compensation rate of \$236.67, (7) claimant filed timely notice of the injury (8) claimant is receiving compensation for this injury under the New Jersey Compensation Act, (9) employer filed a notice of controversion on April 18, 1979.

The parties agree that the sole remaining issue in this case is the question of jurisdiction under the Longshore Act. This hinges upon whether the claimant meets the "status" and "situs" requirements of Sections 2(2) and 3(a) respectively, of the Act.

## EVALUATION OF THE EVIDENCE.

The 33 year old claimant with a 10th grade education began working as a long-shoreman in 1968. He is a member of the ILA and has a union card indicating his job as a HOLD MAN. He testified that he goes aboard ship in addition to loading and unloading ship cargo in the warehouse by driving a fork lift. The claimant testified that on the morning of June 23, 1978 he was operating a fork lift on the truck live in the warehouse, and after lunch, his supervisor (Petrocelli) told him to go to the garage and pick up the truck, load ship's gear on it, and then drive it to a pier in Wilmington, Delaware. Claimant testified that after loading the truck, he drove onto the New Jersey Turnpike and about 30 minutes later the left front tire blew out and caused the accident. He also testified that when he was



assigned to driving a truck he received \$.25 more per hour than when he did other work. Claimant maintained a calendar for the months of May and June 1978 which were introduced into the record (Exhibit E-1, E-2). Claimant testified that he noted the days, hours, and job assignments on it. He testified that for the month of May 1978, on the 3rd, 4th, and 6th he did "longshore" jobs and the other days he was a truck or tractor driver. For the month of June 1978 he testified that on the 6th he was a checker (but the calendar shows "truck"), and that on the 13th and 14th he did "longshore" jobs. All other dates until June 23rd show his job as truck or trailer. There is no notation on June 23rd to indicate what work he was doing on that date because claimant testified he logged his time after the end of the day or the following workday. Ronald

J. Petrocelli, an engineer and manager of operations for Pittston, testified that approximately 3 months prior to the accident the claimant was assigned to a regular job as a truck driver to transport gear and gear parts to various places. He further testified that the claimant reported directly to him every morning. Petrocelli testified that on the morning of June 23, 1978, claimant reported directly to him, they assembled ship gear together for transport to Wilmington, claimant loaded the ship gear onto a truck, and then reloaded it onto a low bed trailer pursuant to Petrocelli's instructions, and then after lunch claimant began driving to Wilmington. Petrocelli testified that claimant did not handle any cargo on that day nor on his job as a truck driver.

After careful evaluation of the demeanor and credibility of the witnesses, I credit the testimony of Petrocelli as to the claimant's work on the date of the injury. I do not believe the claimant's testimony that he was working in the warehouse on the truck line, which he said was his "best recollection." I find that on the day of the injury his job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about 3 or 4 hours away. I find the accident in which he sustained injuries occurred on the turnpike approximately 30 minutes away from the shipyard. I find that on the date of the injury the claimant did not handle any cargo.

#### DISCUSSION AND CONCLUSIONS.

In order to meet the "status" requirements of Section 2(3) of the Act,

the claimant must be an employee "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and ship-breaker ..." Also, the claimant must meet the "situs" requirement of Section 3(a) of the Act to establish "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The term "maritime employment" was defined in *Sedmak v. Perini North River Associates*, 9 BRBS 373 (1978). The Board stated that the claimant's employment must have a realistically significant relationship to maritime activities involving

navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). This has been referred to as the necessity of a "close functional nexus," or "essential," or "integral part of" a maritime enterprise in order to be covered under the Act. In *P.C. Pfeiffer Co. v. Ford*, 100 S. Ct. 328 (1979), the Supreme Court stated that the crucial factor in the scope of maritime employment is the nature of the activity to which a worker may be assigned. In the case before me claimant was assigned the work of driving a truck, and in so doing, he was injured in a vehicle accident on a public highway, a significant distance from any shipyard or marine situs. The fact that the beginning and ending sites of his route were marine terminals does not give him "status" at any time.

Claimant's counsel cites the case of *Brady-Hamilton v. Herron*, 7 BRBS 409 (1978) to support his contention of coverage under the Act. That case is distinguishable on both status and situs grounds. The employee there was engaged in longshore work at least part of his working day and the gear locker room (2000 feet from water's edge), where he was injured, was found to be an adjoining area for loading vessels. As previously found herein, this claimant was not doing longshore work on the day of injury. In fact, for a period of 3 months he performed maritime jobs only infrequently-not more than 3 days during the month of injury and 3 days during the preceding month. It is recognized that the case of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 mandates an expansive view toward the 1972 amendments and directs

continuous coverage for employees who would otherwise be walking in and out of federal jurisdiction during their regular performance. However, claimant herein was not in covered employment during any part of the day of injury and the accident occurred on a public turnpike, a considerable distance from navigable waters or "any adjoining area."

Recently, the case of *Fusco v. Perini North River Associates*, 601 F2d 659 (1979), was remanded to the Ct. of Appeals by the Supreme Court for reconsideration in light of the holding in *P.C. Pfeiffer v. Ford*, *supra*, that the term maritime employment refers to the nature of the worker's activities and that it is an occupational rather than a geographic concept. On June 4, 1980 the Ct. of Appeals (2nd Cir.) denied coverage to two sewage disposal construction workers who

were injured on a project over the water. It seems fair to conclude that Sections 2(3) and 3(a) as interpreted by case law requires that for coverage to attach, workers must meet both the "status" and "situs" criteria.

Based upon my analysis and evaluation of this record, I must conclude that the claimant has not satisfied the "status" requirements of Section 2(3) nor was the injury on a "situs" pursuant to Section 3(a) of the Act.

ORDER.

The claim for Ernest G. Miller for workmen's compensation under the Longshoremen's and Harbor Worker's Act is hereby denied.

s/\_\_\_\_\_  
Reno E. Bonfanti  
Administrative Law  
Judge

REB/det

Dated: June 25, 1980  
Washington, D.C.



APPENDIX D.

TEXT OF 33 U.S.C. 902(3), 33 U.S.C.  
903(a) AND 28 U.S.C. 1254.

33 U.S.C. 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. 903(a)

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area, customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of ---

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any state or foreign government or of any political subdivision thereof.

28 U.S.C. 1254

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.